Note on Mozambique's Anteprojecto de Lei Sobre PPPs e Megaprojectos[1]
(Draft Law version 27 April 2010)

Introduction

Global experience has shown that existence of a clear and comprehensive legal-regulatory framework for Public-Private Partnerships (PPP) -– particularly in civil code countries – is essential to achieving sound governance in PPP projects of all kinds.[1] With preparation of the Preliminary Draft Law on Public-Private Partnerships and Megaprojects ("Law"), and its accompanying Preliminary Draft Regulations ("Regulations"), Government has initiated a valuable effort to begin fashioning such a framework for Mozambique, and thus move toward greater effectiveness in PPP investments and operations.

This Note offers reflections on the Law/Regulations for the consideration of Mozambique's policy-makers, private sector, and donor community. To the extent possible, the reflections focus on select Law/Regulations provisions in light of "best practice" for PPPs – though the standard is admittedly elastic given the diversity of PPP formulas and the wide variety of economic, social and legal settings in which PPPs models have been implemented. For this purpose, particularly useful best practices references are found in documents of the UN Conference on International Trade Law (UNCITRAL) and of the Organization for Economic Cooperation and Development (OECD).[2] UNCITRAL's Legislative Guide on Privately Financed Infrastructure Projects and its Model Legislative Provisions on Privately Financed Infrastructure Projects obviously focus on PPP in infrastructure sectors, while the OECD's Basic Elements of a Law on Concession Agreements addresses PPP in both infrastructure and natural resource projects. All three references contain principles highly relevant to the themes and objectives of the Law and Regulations.[3]

Organization and Overview

Reflections in this Note are organized around specific provisions of the Law and its related Regulations. Three groups are identified for comment. First, certain provisions of the Law and Regulations seem to be under-specified. Compared to best-practice, these provisions appear to be too general, and thus risk introducing ambiguity and inefficiency in designing and applying PPP solutions. Second, other provisions in the Law and Regulations seem to be over-specified. These provisions appear to be too rigidly defined relative to best practice, and would establish serious restrictions that could constrain and reduce the attractiveness and productivity of PPP projects. For both of these categories, various individual provisions are cited, with brief explanations of major best-practice issues involved. The array of provisions emphasized is not exhaustive, but representative of the respective categories. Finally, a third group of provisions is also highlighted for additional clarifications. These are clauses whose suitability and or meaning within the Law and Regulations seem open to question. Comments are presented on these provisions, again with respect to possible best-practice considerations.

An overview of the three categories of provisions, including a summary of some possible best practice issues plus related comments on each, is set forth in Table 1. Additionally, as a general frame of reference, an outline of the structure and array of articles included in Kosovo's PPP/Concession Law is presented in Annex 1, since this legislation is relatively new (June 2009), and is reported to have been developed with considerable assistance from leading PPP experts within the European Union.

Under-Specified Provisions

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PPP arrangements demand clarity, precision and predictability in order to be attractive and viable options for private sector investors and operators. A transparent and stable set of PPP rules is also important for communicating the commitment of government to PPP approaches and establishing the durable public and private sector roles and responsibilities that long-lasting PPP projects require. Some provisions in the Law and Regulations seem too general or imprecise to establish the desired clarity and stability. Examples include clauses on basic PPP definitions, tendering, rights in ownership, institutional framework for PPP oversight, termination and stabilization.

PPP definitions and contracting modalities (Law, Art. 1 and 18 and Glossary; Regulations, Art. 26-29 and 54)

The Law defines only three types of PPP contracting arrangements: concession contracts (contrato de concessão), operating concession contracts (contrato de cessão de exploraço) and management contracts (contrato de cessão de gestão). In the first, the concessionaire receives rights to create and develop, as well as rehabilitate, use, operate, manage and maintain infrastructure, property or other assets belonging to the public sector. In the second, the concessionaire receives rights to rehabilitate, use, operate, manage and maintain infrastructure, property or other assets belonging to the public sector. In the third, the contractor receives rights to manage and maintain infrastructure, property or other assets belonging to the public sector. In all, concessionaires or management contractors are to be compensated by the flow of revenues generated through their use and management of the PPP facilities to deliver services or products.

1. *Generality of PPP definitions*. Most PPP legislation typically defines and details PPP forms with greater precision than what is offered in the Law and Regulations. For example, the "concession contract" specified In the Law seems to be tied to rights to develop and use new facilities – what is often called "Greenfield PPP". By contrast, the Law's "operating concession contract" may involve rights to use and operate only existing public facilities. This distinction is not explicitly emphasized, and the range of different PPP formulas that could be associated with these broad concession forms is not identified. For concession contracts, these could include Design-Build-Finance-Operate (DBFO), Build-Operate-Transfer (BOT) and Build-Lease-Transfer (BLT), among others. For operating concession contracts, these could be Rehabilitate-Operate-Transfer (ROT), Rehabilitate-Lease-Transfer (RLT) and Build-Rehabilitate-Operate-Transfer (BROT) and others. Differentiations of this kind are useful in PPP/concession legislation to convey the flexibility and creativity of permissible PPP solutions, and to give PPP companies room to fashion PPP models for a wide spectrum of project risk allocation needs.[4]

2. *Possible elimination of important PPP forms*. The Law/Regulations appear ambiguous on the ownership rights of concessionaires within PPPs (see below "Rights in ownership for concessions"). If these rights are in fact constrained, a common and highly useful form of PPP could be out of reach for Mozambique: Build-Own-Operate-Transfer (BOOT). This approach allows a PPP project to develop and then own infrastructure, property or other assets in order to deliver goods/services in the public domain, with this ownership confined to a fixed period of time prior to transfer of properties and other assets back to the State. Given the Law as an important mechanism to facilitate effective PPP, elimination of such a PPP form seems counterproductive.[5]

Tendering (Law, Art.8, 17, 48; Regulations, Art.12, 16-22, 61-66)

Compulsory public tender is established by Law and Regulations for the process of contracting all PPP projects, including unsolicited ones proposed by the private sector. In the Law, phases of PPP project development from concept to contract award are listed, with detailed processes left to Government to further define. In the Regulations, two sets of somewhat overlapping clauses – 13 articles in all – supply additional information on both procedures leading up to tendering and tendering itself. Still other provisions on conflict of interest in the Law (Art. 31-33) and Regulations (Art. 43-45) would also apply.

1. *Tendering process scope and form*. Provisions on PPP project development and tendering, although rather abbreviated in the Law, are among the most detailed and numerous clauses in the Regulations. Taking the Law and Regulations together, upon initial review, the tendering process may seem fairly well defined. But with the UNCITRAL's Legislative Guide and Model Legislative Provisions as norms for modern PPP/concession tendering practice, certain weaknesses appear. First, in scope, the tendering process UNCITRAL outlines is more comprehensive than that of the Law/Regulations. UNCITRAL's Legislative Guide offers 25

recommendations covering all tendering steps from pre-selection through contract award and review,[6] and UNCITRAL's Model Legislative Provisions include 22 model provisions for the same span of activity.[7] Second, in form, these Model Provisions are considerably more concise than the language of the Law/Regulations, and seem to flow in a more streamlined sequence of steps.

2. *Apparent tendering process gaps*. In substance, UNCITRAL's Model Legislative Provisions underline at least four dimensions of tendering process in which the Law and Regulations seem relatively thin or even silent by comparison. Pre-selection is one of these, and includes detailing actions ranging from identifying bidders to qualifying them for PPP/concession tenders, all essentially steps neglected in the Law/Regulations. Specification of standards for evaluating both technical and financial proposals is another, and features criteria arguably more robust and operational than those in Regulations (Art. 20). Additionally, the Model Provisions allow for negotiation of concession contracts without competition in some limited circumstances (e.g., for reasons of national security or when only one party is qualified to undertake the concession in question). And they provide for a review process for bidders claiming loss/injury from a contracting authority's breach of procurement procedures. Both of these last two elements in the Model Provisions' tendering process are presently absent from the Law/Regulations. To enhance comprehensiveness, fairness and transparency in tendering under the Law/Regulations, measures to remedy all of these gaps are worth consideration.

Rights in ownership for concessions (Law, Art. 10; Regulations, Art. 14)

In the Law, the State (or public sector contracting entity) appears to retain all rights of ownership over the PPP project, including its fixed assets and other equipment and any natural resources transferred to the concessionaire for use and development. The Regulations underscore these ownership rights and seems to limit the ability of the PPP project/concessionaire to pledge or mortgage any assets against future borrowings, including income streams.

1. *Concessionaire's possibly limited ownership rights*. The Law/Regulations make clear that concessionaires are to develop, rehabilitate and/or improve infrastructure, properties and other assets associated with their concessions. In fact, the Law sets all concession contract durations as a function of the investments concessionaires will make (see below "Contract duration"). If the concessionaire, as it develops, expands or improves properties can simultaneously create its own ownership rights alongside those of the State – normally the PPP project situation – this fact is essential to convey. In common PPP practice, this is achieved in one of two ways. In some instances, rights in ownership for concessions are briefly explained in framework PPP/concession legislation.[8] In others, framework legislation directs that rights of ownership for project assets be specified in the detailed concession agreement that underlies any given PPP. (Such a clause is however absent from the Regulations (Art. 55) list of compulsory provisions to be part of all PPP project agreements.)[9]

2. *Impact of ambiguity on concessionaire's ownership rights*. The lack of clarity regarding the concessionaire's possible ownership rights in PPP project assets could have at least two significant consequences. First, it could adversely affect the concessionaire's ability to create security interests in project assets – not only physical assets, but for the value of the concession itself – which are required to obtain financing for concession investments.[10] Typically, because debt is important in PPP concession finance, concessionaires need to create security rights over payments received or receivable under a concession.[11] Second, such lack of clarity on ownership rights can limit the array of PPP forms available to PPP/concession undertakings, as noted earlier (e.g., BOOT models). For both reasons, best practice suggests that the Law/Regulations should be both more explicit and more flexible on the issue of concessionaire's ownership rights.

3. *Step-in rights for concession financiers*. Some of its language notwithstanding, the Law may not in fact intend to limit the concessionaire's ability to create security interests. Under the Regulations (Art. 54) the concessionaire seems to be allowed to conclude "step-in agreements". Such agreements give comfort to potential lenders and are critical to facilitating financing for concessions. If the concessionaire is in breach of a contract, they allow lenders – whose primary security is normally the PPP project's revenue stream – to step in to a concession and, with the consent of the public sector contracting entity, select a new concessionaire to perform the PPP project. The Regulations' inclusion of step-in agreements among complementary contracts permitted to the concessionaire would seem to imply recognition of concessionaire property rights in PPP

projects under the Law, including rights to income streams generated. If so, such rights should be clarified, and, to encourage lenders, these step-in rights should be given prominence in the Law itself – e.g. in an article on "rights of concession financiers."[12] This would be a priority best-practice improvement for the Law.

Institutional framework (Law, Art. 11-14; Regulations, Art.6-9): The Law sets up double oversight, by sectoral and financial entities, with detailed distribution of responsibilities between them. It also calls for creation of a PPP and Megaprojects Unit ("PPP Unit") in the financial oversight entity (i.e., Ministry of Finance). Complementing the sectoral/financial oversight, PPP projects will also be subject to relevant regulatory authority in their areas of activity. These arrangements seem institutionally complex, but at the same time under-defined in key respects.

1. *Complex oversight structure*. A multilayered structure of double "tutela" (oversight), PPP Unit and regulatory authority supervising PPP projects has potential for creating great administrative inefficiencies. Because PPPs typically touch a range of technical, financial and social domains, several agencies of government will have legitimate concerns in reviewing design and monitoring operations of PPP projects. The key issue is coordination of such concerns and avoidance of overlap. It does not appear that the Law and Regulations – for all their detailed listings of oversight responsibilities – have adequately addressed this matter by providing clear lines of authority, division of responsibility and mechanisms to consolidate and coordinate oversight activity. Furthermore, the overall tone of oversight in the Law and Regulations is control alone, with no attention to need for facilitation of PPP activities, particularly in the critical matter of permitting and licensing.

2. *Coordinating capacity of PPP Unit*. International experience shows the value of setting up a central unit to provide guidance on PPPs and coordinate inputs of public authorities interfacing with PPP projects.[13] Hence, the proposed PPP Unit, defined in the Regulations to possess with certain coordination responsibility (Art. 8), may be a useful body, albeit with a heavy control focus, and no explicit facilitating tasks (e.g., in permitting and licensing issues). However, as a subordinate entity within the Ministry of Finance or other entity entrusted with financial oversight, the PPP Unit may not be sufficiently powerful or autonomous to play an effective coordinating role. If there is to be a double tutela, an "Inter-Ministerial Steering Committee" (ISC) to lead coordination of Mozambique's PPP policies and operations may be called for. Kosovo's recent PPP Law offers a useful example of the structure and functions of such a body and its relationship to a subordinate PPP Unit.[14]

3. *Additional oversight by regulatory authorities*. Under the Law, sectoral and sub-sectoral regulators will also have authority over PPP project enterprises, in addition to any sectoral and financial tutela. As described in the Regulations (Art. 9), the regulatory authority functions involve ensuring PPP project compliance with its contractual obligations, as well as with laws, rules and standards governing its activities and investments. Such functions suggest possible overlap with the roles of sectoral and financial oversight bodies. In the interest of avoiding conflicts and confusion, greater specificity is needed to spell out the division of powers between regulatory bodies and oversight entities with which PPP projects will deal.[15] Descriptions of such responsibilities could also usefully include definition of an explicit review procedure to give PPP projects right of recourse against regulatory or other supervisory or oversight decisions.

Termination (Law, Art. 42, 48, 51-52; Regulations, Art. 55 and 72)

Provisions governing the circumstances under which a contract can be terminated or cancelled are left in the Law to the Council of Ministers to define (with all other essential clauses). However, violation of any provision of the Law may lead to contract cancellation where matters involved cannot be amicably resolved. The oversight entity ("entidade de tutela", financial or technical) concerned with the portion of the contract in which the violation occurred would hold authority to cancel the contract. This seems open to arbitrary action and possible conflict.

1. *Rights of termination*. Modern PPP/concession legislation appears to be far more explicit about rights and conditions of contract termination than does the Law.[16] Beyond termination due to normal contract expiry, PPP/concession laws typically include provisions for termination by the public sector contracting authority for several situations: serious breach by the concessionaire, before or during construction, and during operations; concessionaire insolvency; and reasons of public interest. They also normally provide for terminations by the concessionaire for the public sector contracting authority's serious breach, or for changes in conditions.[17]

Additional provisions also often give either party the right of termination, upon mutual consent, for circumstances reasonably beyond either party's control.

2. *Compensation for termination*. In the event of termination, PPP/concession legislation will also normally provide for measures and mechanisms to calculate and permit compensation, as well as orderly windup and transfer of assets by the concessionaire to the public sector contracting authority.[18] While eventual Council of Ministers guidelines or decrees might later address such matters, a more streamlined approach would seem to be inclusion in the Law of a concise statement of termination events and procedures, as well as principles upon which compensation would be due. The latter might include issues of compensation not only at termination but also at normal expiry, assuming some residual value remains in the investments of the exiting concessionaire (see below "Extension and renegotiation" under Other Provisions Requiring Clarifications).

Agreements already signed (Law, Art. 54; Regulations, Art. 74)

The Law's "stabilization clause" (Art. 54, para. 1) seems to suggest that for already approved (and presumably functioning) PPP projects, renegotiation of their project agreements "is permitted", so as to make them consistent with the new Law's provisions on sharing benefits and mitigating risks. The qualifying condition seems to be that such renegotiation is not to disturb the economic-financial balance of the project in question. On the other hand, upon expiration of existing PPP projects, all new project agreements that replace them are to be adjusted to conform to the Law's treatment of benefits and risks.

1. *Impact of the provision*. Stabilization provisions are standard practice for PPP/concessions, and are meant to provide protection for existing projects from the negative financial impacts of future changes in legislation.[19] As defined, the Law's stabilization clause seems awkward and ambiguous, and rather than shield existing PPP projects from possible negative consequences of change in legislation, it introduces new uncertainties. This could have adverse impacts on Mozambique's investment climate and future competitiveness to attract FDI.
2. *Restoring stabilization*. Assuming that the intent is clarity and predictability, a best-practice "agreements-already-signed provision" could simply specify that contracts signed prior to the Law are not subject to the Law, but can only be renewed, amended or extended in compliance with the Law.[20]

Over-Specified Provisions

PPP arrangements are about allocating risk efficiently, and the need to accommodate a diversity of industries and economic conditions in doing so. Concession/PPP law should therefore allow for negotiability. As stated in Recommendation 12 of UNCITRAL's Legislative Guide: "No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project."[21] Some parts of the Law and Regulations seem that they would be excessively rigid and binding on negotiators as they seek allocations of risk that are balanced and appropriate in any given project. These include certain provisions concerning contract duration, national ownership, concession fees and royalties, and profits and dividends, all major ingredients in the economic and financial dynamics of PPPs/concessions.

Contract duration (Law, Art. 9; Regulations, Art. 13)

The Law fixes maximum contract durations, by type of contract (concession contract, 25 years; operating concession contract, 20 years; management contract, 15 years). Within these maximums, the Regulations detail additional subsidiary ceilings on contract duration, phased by economic amortization of project investments.

1. *Maximum limits on duration*. For infrastructure, proposed maximums in the Law may be reasonable, although concession lengths can certainly be longer.[22] Chile, a PPP leader, for example, sets an overall 50-year ceiling for concessions, but leaves exact duration for any given project to be fixed in bidding documents.[23] For mining, oil/gas and other natural resource-based activity, different concession maximums may be more appropriate than those for infrastructure given the nature of the activities and investments involved, so the Law as written may not provide sufficient flexibility in setting length of contracts.

2. *Additional limits on duration*. The subsidiary phased contract ceilings detailed by Regulations seem overly restrictive, elaborate, and ultimately arbitrary despite the attempt to relate them to capital recovery timeframes. In sum, the Regulations (Art. 13) seem counter to UNCITRAL best practice: "given the difficulty of establishing a single statutory limit for the duration of infrastructure projects it is advisable to provide the contracting authority with some flexibility to negotiate, in each case, a term that is appropriate to the project in question."[24]

National ownership (Law, Art. 20; Regulations, Art. 31)

Both Law and Regulations address the issue of Mozambican ownership participation in PPP projects, but in contradictory ways. The result is confusing and overly restrictive. The Law provides that PPP projects – financed by Mozambican entrepreneurs or by foreigners – should consider opening at least 20% of total ownership for participation by Mozambican society generally, presumably small individual investors ("participação reservada para pulverização pela sociedade moçambicana"). Regulations, by contrast, require that no less than 20% ownership in such projects be reserved for individual Mozambican citizens. Government is directed to adopt measures to make such reserved ownership shares available to Mozambican citizen investors within 5 years of a project's first profitable fiscal year. The Regulations seem to suggest that a transfer of PPP project equity to the general investing public could take place through public sale of shares, perhaps after a period in which such equity is temporarily held by the State. Additionally, both Law and Regulations propose that foreign-financed PPP projects should consider opening ownership participation to Mozambican national firms, but do not require them to do so.

1. *Reservation of ownerships shares for acquisition by citizen small individual investors*. PPP/concession laws are typically silent on national ownership in projects by private firms, individuals or Government, dealing with this issue (if at all) by reference to other legislation (e.g., foreign investment regimes). Reserving ownership shares in PPP projects for citizen small investors and describing methods by which the latter would acquire such shares is thus uncommon practice.[25] A notable exception is South Africa, whose National Treasury PPP Manual details clear procedures for achieving a black ownership share of private party equity in PPP projects.[26]

2. *Reserved minimum 20 % national ownership share*. South Africa's PPP Manual does not mandate a fixed percentage black ownership share in private party equity, but specifies that the "actual percentage set will vary from project to project."[27] However, a Black Economic Empowerment (BEE) component – including proposed size, source and financing arrangements for black equity – is a required part of every PPP bid, and receives a mandated 10% weight in bid evaluation. If promoting national ownership is to be an element of the Law, the South African approach seems a more flexible model for pursuing this end than the rigid across-the-board 20% minimum ownership share established by the Regulations (Art. 31).

3. *National equity participation in foreign-financed PPP projects generally*. Outside PPP legislation, some countries do of course foster national ownership by imposing restrictions on foreign participation in various industries, including PPP-oriented ones such as telecoms or transport. But many countries have no restrictions on foreign equity in local firms – i.e., no designated ownership share for nationals. Where prescriptions for foreign/national ownership shares exist, they vary widely by industry and country, without any evident pattern.[28] Hence, the issue of legislating national ownership shares does not easily lend itself to best-practice analysis – and in an environment of economic policy liberalization such restrictive rules would certainly be considered antithetical to best practice in the first place.

4. *Government's equity participation*. Assuming that establishing national ownership shares in PPP projects continues to be a firm component of the Law and Regulations, Government may well have a role to play in realizing this objective. In fact, in various situations, Government contribution of equity is recognized as a legitimate form of public sector support for PPP projects. Government equity participation in a project company is way to provide additional capital, improving the enterprise's debt-equity structure. It is also acknowledged as a way to satisfy legal requirements concerning national ownership in locally established companies, especially where national investors lack interest, resources or experience to participate.[29] However, if Government's equity shares are to be eventually transferred to local private investors (as seems

to be envisaged in the Law/Regulations), the best method for doing so is not a PPP issue per se. Rather, it would depend on the state of local financial institutions and capital markets and the strength of the domestic investment community.

Concession award fee (Law, Art. 21; Regulations, Art. 32)

For concession contracts (contrato de concessão) and operating concession contracts (contrato de cessão de exploraço), the Law requires a concession award fee to be paid at contract signing, in an amount between 5% and 10% of expected average annual after-tax profits. The Regulations provide additional information on the exact percentage fee rates to be set within this range, based on contract duration. The calculation of this fee base (expected average annual after-tax profits) is apparently undiscounted.

1. *Fee requirement*. By definition, under a PPP concession, government transfers rights to the private sector to operate a public service, such as an infrastructure system-based utility. The private sector is often required to pay a fee to government to acquire this right.[30] Mozambique's own CCFB Beira Rail Concession, developed by Government with technical assistance from the World Bank, called for the concessionaire's payment of an entry fee of $2million.[31] But concession award fees are not necessarily a universal feature in PPP projects: e.g., in India not all concessions pay a "negative grant" to government (India's equivalent of a concession award fee). Furthermore, based on the India experience, there is some evidence that when required, such fees may have negative consequences, as they are often financed by debt, in the process increasing the leverage (and thus financial risk) of the PPP project in question.[32]

2. *Fee formula and level*. Where concession award fees are required, in keeping with the flexibility recommended by UNCITAL's Legislative Guide, it is unlikely that they would be fixed in basic PPP legislation in a formula as rigid as the one set forth in the Law and Regulations. Further, the Law/Regulations' required fee level of 5% to 10% of expected after-tax profits seems likely to be excessive, especially when combined with other mandated payments to be made by the concessionaire (below).

Concession and management contract royalties (Law, Art. 22-23; Regulations, Art. 33-34)

For all concession contracts and operating concession contracts not governed by the mining/petroleum fiscal regime, the Law provides that royalties be paid to the State or public sector contracting entity in amounts equivalent to 5% to 10% of annual after-tax profits (fixed charge) and 5% to 10% of gross receipts net of indirect taxes (variable charge). Regulations provide that exact percentage fee rates are to be set within this range, based on contract duration. Law/Regulations establish a similar royalty arrangement for management contracts (cessão de gestão), again equivalent to 5% to 10% of gross receipts net of indirect taxes, with exact rates set relative to contract duration.

1. *Royalty requirement*. Concession contracts/operating concession contracts often require royalty payments by the concessionaire. The CCFB Rail Concession, for example, calls for CCFB to pay royalties to the Government of Mozambique of both a fixed fee of $1 million annually from project years 11 through 25 (indexed to US inflation), and a variable fee from project year 6 based on percent of turnover calibrated to traffic volume.[33] Further, in natural resource concessions everywhere, royalty payments to government are a standard provision.[34] The Law/Regulations' inclusion of the principle of concession royalties is therefore neither unusual nor unreasonable, though the detailed formulas for defining required payments may be open to challenge.

2. *Use of subsidies*. Of course, in many PPP situations around the world – especially management or lease contracts, but also in some concessions – revenue flow can be in the other direction, essentially "reverse royalties," with government paying a PPP project to provide services or offset shortfalls in tariff revenues that the project earns from users.[35] The "Unitary Charge" payment embedded in the UK's Private Finance Initiative (PFI) is typical: this is a mechanism by which a public sector entity pays for public services from a private sector concessionaire/operator contracted to produce and deliver such services. The Unitary Charge can be set up in various ways depending on PFI project needs, including – where tariff revenues generate a surplus for the

private concessionaire/operator – to allow the public sector contracting entity to share in this surplus.[36] Under the Law (Art. 45) and Regulations (Art. 58) the State has the latitude to disburse Unitary Charge-like subsidy payments to PPPs that operate at price or tariff levels administratively fixed below real costs of production.

3. *Royalty structure and level*. Similar to the situation for the concession award fee, the mechanical Law/Regulations formulas for royalty payments for concessions, operating concessions and management contracts seem to run counter to best practice principles of flexibility in PPP arrangements. Furthermore, in combination, concession award fees and royalties could substantially reduce profitability of any given PPP concession, and rigid gross receipts-based royalty formulas could easily make management or lease contracts non-viable for private parties. More freedom to set fees on a project-by project basis is surely needed.

Profits and dividends (Law, Art. 26; Regulations, Art. 38)

After the close of a PPP project's fiscal year or other designated accounting period, profits and dividends are to be declared and distributed. The option of retaining earnings, often essential to PPP companies for undertaking investment and maintaining sound capital structure, is not specifically recognized in either the Law or Regulations.

1. *Distribution of profits and dividends*. PPP legislation generally appears silent on matter of retained earnings and distribution of profits and dividends, presumably leaving such issues for treatment under company law. UNCITRAL's Legislative Guide, for example, implies that PPP concession companies may typically fall under a host country's normal accounting rules, and that such rules might prohibit distribution of dividends in financial years with negative results,[37] but does not otherwise address the profits/dividends issue. Logically, best practice would seem to indicate that PPP companies should typically have discretion over distribution of profits and dividends as well as the issue of retaining earnings, at least within the standards negotiated for a specific project's concession agreement. PPP projects are normally set up as private companies – e.g., for Mozambique, the Law requires (Art. 15) that a PPP project be constituted as a commercial company (sociedade comercial autónoma) – and "basic PPP principles" suggest that the State should not have a right to interfere with the way a private company handles its profits or any other activity.[38] If the intent or result of the Law/Regulation is to force PPP companies to distribute all profits and dividends and prevent them from retaining earnings, the relevant provisions are too restrictive and need to be amended.

Other Provisions Requiring Clarifications

In addition to the provisions emphasized above, the basic suitability and meaning of certain other clauses in the Law and Regulations have also been questioned, both in donor comments and other discussions. These provisions deserve clarification, particularly in regard to possible PPP best practice issues. The provisions involved concern the appropriateness of the concession legislation's overall scope, contract extension and renegotiation, use of performance bonds, and relevance of language on foreign exchange earnings or savings.

Scope (Law, Art. 3; Regulations, Art.3)

The Law and Regulations cast a wide net, perhaps far too wide: they purport to cover all PPPs providing goods and services within the public domain; plus megaprojects; plus any other business concessions undertaking economic and/or social activities in the public domain. "Megaprojects", which appear to notably include concessions based on minerals, oil/gas or other natural resources, can be thought of as undertakings featuring investments of $500 million or more, governed by Mozambique's Investment Law and Fiscal Incentive Regime, and with potential to substantially impact national economic growth. At the other end of the scale, certain PPP infrastructure or business concessions under the Law could be considerably smaller, simpler and much more modest in significance relative to Mozambique's total economy. As a result, the Law's scope may be unusually broad and ultimately too unwieldy to fit all its target sectors and activities. It is true that some model PPP concession legislation is indeed designed to accommodate in the same text PPP in both provision of infrastructure systems and services and development and use of natural resources.[39] Nevertheless, in Mozambique's case, the nature and scale of the possible infrastructure, business and natural resource extraction PPP/concessions to be covered under the Law/Regulations may indeed be too varied to manage properly. At a minimum, a careful review seems in order to

examine the likely benefits and costs of across-the-board application of the Law's restrictive and rather mechanical formulas -- e.g., for contract duration, concession award fees and the like – in both infrastructure and natural resource concessions. The analysis would look at the appropriateness of universally applying such parameters to all sectors, both in terms of impacts on operating economics of infrastructure PPP projects and Megaprojects, and implications for Mozambique's competitiveness in attracting investment to these sectors in the future. At a maximum, the utility of creating a separate Megaprojects PPP Law and regulatory regime would be explored. In the meantime, there may already be reason to question whether the Law's concession approach is best for the oil/gas sector: today, more than half of all oil/gas industry activity involving transnational corporations seems to take place within production-sharing agreements, not in concessions, as was past practice.[40]

Extension and renegotiation (Law, Art. 9 and 43; Regulations, Art. 13 and 56)

More often than not, PPP/concession legislation excludes the possibility of concession renewal, on the theory that doing so gives the concessionaire greater incentive to perform.[41] Consistent with this principle, according to the Law and Regulations, expiring concessions are to be re-competed, with no mention of renewal (Law Art. 9; Regulations, Art. 13), although this creates certain compensation issues that still need to be addressed.[42] On the other hand, opportunities for extension of PPP/concession contracts are normally present in legislation, albeit only under rather narrowly defined circumstances. The Law and Regulations are therefore fairly consistent with common PPP/concession legislative practice on this issue. For example, the Law provides for extension of the PPP/concession contract for a period of up to one half the initial contract duration, but under specific conditions, notably to offset force majeure, adverse tariff policies mandated by the public sector contracting entity, cost of investments required by the public sector contracting entity, or impacts of large-scale infrastructure development for public use (although this last condition is absent from the Regulation). Such conditions roughly track UNCITRAL's recommendations concerning extension.[43] The same is true for renegotiation: PPP/concession legislation normally allows some limited opportunities for renegotiation, reflecting the fact that PPP arrangements require private parties to assume project risk, especially commercial risk, but also understanding that PPP project conditions can change in ways that are beyond the concessionaire's control. The Law and Regulations, which permit contract renegotiation by mutual consent after five years to address obviously altered circumstances, are generally in line with this practice. By way of comparison, the new Kosovo and Mongolia PPP/concession legislation both include provisions for amendment of concession agreements in response to changes in economic and financial condition or in legislation and regulation affecting the concession that the concessionaire could not have reasonably anticipated or avoided. [44]

Performance guarantees (Law, Art. 44; Regulations, Art. 57)

The Law and Regulations require concessionaires (and presumably management contractors) to deliver guarantees covering the bidding process and the implementation of concessions, including construction of works and supply of equipment, plus eventual return of all concession assets in good order to the public sector owner. Provision for performance guarantees tends to be a standard feature of in PPP concession legislation, for both the bidding[45] and concession implementation stages. During the latter, various guarantee or bonding arrangements are possible. In PPP project concession agreements, such bonding arrangements are often structured as a sequence of independent guarantees to cover a succession of performance periods: construction, operations and hand-over of concession assets.[46] The detailed parameters of the required guarantees are not necessarily set forth in PPP legislation, but are more typically left to project agreements to settle.

Foreign exchange earnings (Law, Art. 24; Regulations, Art. 36)

The Law observes that PPP projects exporting goods and services should make a positive contribution to foreign exchange revenues and thus impact the balance of payments favorably. PPP projects achieving import substitution in the domestic market should have a positive impact on foreign exchange reserves and the balance of payments. The Regulations require that regulatory authorities and oversight entities annually analyze projects' balance of payments impacts. However, since such provisions do not appear to create any right or obligation for the projects in question, the usefulness of these clauses within the Law and Regulations seems limited. In fact, such provisions

may be more appropriate for a statement of PPP policy than for PPP legislation. Moreover, if these provisions can somehow be interpreted to imply restrictions on concessionaire rights to obtain, retain and use foreign exchange – apparently the case in some readings – the language should be removed from the Law and Regulations to erase any such suggestions and uncertainties.

Summary Reflection

This brief review of the Law and Regulation suggests four conclusions. First, the Law and Regulations, an ambitious initial step toward a comprehensive legal framework for PPP/concessions in Mozambique, are still works-in-progress. Second, several of the provisions they contain appear to be too broad, ambiguous or incomplete to provide the stable and predictable legal environment for PPP/concessions that the private sector will require. Third, other provisions, many of them at the heart of the economics of PPP projects, seem too restrictive and rigid to allow the pragmatic allocation of risk that is essential to PPP models. Finally, as Mozambique's PPP experts revise the present Law and Regulations, there are useful references (UNCITRAL, OECD, etc.) available to help sharpen the outcome. And, among other important and detailed insights, one of these references includes a particularly valuable guideline: "Concentration on essentials is a major quality feature of concession legislation – less is more."[47]

END NOTES

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[1] UNECE, A Guide to Promoting Good Governance in Public Private Partnerships, 2007, pp. 13-16.

[2] UNCITRAL's Legislative Guide on Privately Financed Infrastructure Projects (2001) presents 71 "legislative recommendations" designed to help establish a legislative framework favorable to privately financed infrastructure, plus extensive background analysis of these principles. UNCITRAL's Model Legislative Provisions on Privately Financed Infrastructure Projects (2004) provides further clarifications through a concise set of 13 legislative recommendations, 51 model provisions and accompanying analysis, all intended to strengthen good governance of privately financed infrastructure projects. OECD's Basic Elements of a Law on Concession Agreements (Multilateral Centre for Private Sector Development – Istanbul, 2002) offers a statement of guiding principles on modern concession law for both infrastructure and natural resource projects, with additional analysis and commentary on these principles relative to international best practice.

[3] Other valuable sources include: OECD's Public-Private Partnerships, In Pursuit of Risk-Sharing and Value for Money (2008); European Commission Interpretive Communications on Concessions Under Community law (2000/C 121/02); European Commission Guidelines for Successful Public-Private Partnerships (2003); European Commission Green Paper on Public Private partnerships and Community Law on Public Contracts and Concessions (2004); IMF, Public Private Partnerships (2004); EBRD's Core Principles for a Modern Concession Law at http://www.ebrd.com/country/sector/law/concess/index.htm; and the World Bank's PPP in Infrastructure Resource Center at http://www.worldbank.org/pppiresource.

[4] Two relatively recent PPP/concession laws provide practical and up-to-date examples: Republic of Kosovo, Law on Public-Private Partnerships and Concessions in Infrastructure and the Procedures for their Award, June 2009, Art. 4; and Law of Mongolia on Concessions, March 1, 2010, Art. 4. The former was prepared with substantial inputs from the European Union, and the latter with significant assistance from the World Bank.

[5] Another frequently employed form of PPP may also be inapplicable under the Law: Build-Own-Operate (BOO). This approach features a PPP project company building infrastructure and/or other facilities, owning these assets indefinitely with no transfer to the public sector required, and using them to deliver goods/services in the public domain. This PPP form would seem to be excluded under the Law both for reasons of constraints on PPP project ownership interest and limitation on the duration of PPP contracts.

[6] UNCITRAL, Legislative Guide, pp. xiii-xviii.

[7] UNCITRAL, Model Legislative Provisions, pp. 7-20.

[8] See for example, Kosovo's Law on Public-Private Partnerships and Concessions, Art. 9 and 47; and Mongolia's Law on Concessions, Art. 5.

[9] UNCITRAL, Legislative Guide, pp.108-109

[10] Ibid, pp. 118-122.

[11] OECD, Basic Elements of a Law on Concession Agreements, p. 21.

[12] See for example, Mongolia Law on Concessions, Art. 28.

[13] UNCITRAL, Legislative Guide, pp. 28-30.

[14] Such an ISC, made up of key ministries (Economy and Finance – ISC chair – Trade and Industry, Environment and Spatial Planning, plus a representative of the Prime Minister, as well as ex-officio members of other public authorities with interests in specific PPP projects), is to control and coordinate PPP projects in all economic and social sectors. Among other rights and duties, the ISC is empowered to manage and develop national PPP programs and policies, issue PPP implementing regulations and ensure oversight and review of performance compliance and project execution. It is supported by a PPP Unit that is to act as the ISC's technical secretariat, including in matters of PPP coordination activity. See Republic of Kosovo, Law on Public-Private Partnerships and Concessions, Art. 11-13.

[15] UNCITRAL, Legislative Guide, p. 33-35.

[16] See for example Republic of Kosovo, Law on Public-Private Partnerships and Concessions, Art. 61-66.

[17] UNCITRAL, Legislative Guide, pp.153-161; UNCITRAL, Model Legislative Provisions, pp. 29-30.

[18] UNCITRAL, Model Legislative Provisions, p. 30.

[19] OECD, Basic Elements of a Law on Concession Agreements, p. 21 and p. 27.

[20] This is the language of the Kosovo Law on Public-Private Partnerships and Concessions, Art. 72, and is based on UNCITRAL, Model Legislative Provisions No. 39 and 40.

[21] UNCITRAL, Legislative Guide, p. xiii and p. 42.

[22] World Bank, Concessions for Infrastructure (World Bank Technical Paper 399), 1998, p.49.

[23] República de Chile, Ministerio de Obras Públicas, Reglamento DFL MOP Nº 164 (with modifications as published in the Decreto Oficial of 20 March, 1999), Art. 73.

[24] UNCITRAL, Legislative Guide, p. 151.

[25] One of the most well-known national ownership schemes was set up in the 1970's under Malaysia's New Economic Policy (NEP) and by law required that all new businesses had to have at least 30% ethnic Malay (Bumiputera) equity ownership. Such Bumiputera policies persisted into the present decade, and certainly seem to have increased ethnic Malay ownership, but the full effects and measurement of NEP achievements are appear subject to dispute. See K.S. Jomo, The New Economic Policy and Interethnic Relations in Malaysia, United Nations Research institute for Social Development, 2004, p.18. In recent years, Malaysia has significantly liberalized these policies: new and existing firms in the manufacturing sector were exempted from Bumiputera ownership rules in 2003, and in 2009 the restrictions were lifted in the services sector and for companies seeking listings on the Malaysian stock exchange.

[26] Republic of South Africa, National Treasury PPP Manual, Module 2: Code of Good Practice for BEE in PPPs, National Treasury PPP Practice Note No. 3 of 2004, pp. 10-11.

[27] Ibid.

[28] UNCTAD, Measuring Restrictions on FDI in Services in Developing Countries and Transition Economies, 2006, pp. 24-27.

[29] UNCITRAL, Legislative Guide, p. 48.

[30] OECD, Public-Private Partnerships, In Pursuit of risk-Sharing and Value for Money, 2008, p.23.

[31] CCFB Presentation on Beira Rail Concession, Workshop on Large Project finance, Maputo Mozambique, February 7, 2008. Slide14.

[32] Clive Harris and Sri Kumar Tadimalla, “Financing the boom in public-private partnerships in Indian infrastructure”, in PPIAF Grid Lines, Note No. 45, December 2008, p. 2.

[33] CCFB Presentation on Beira Rail Concession, Workshop on Large Project finance, Maputo Mozambique, February 7, 2008. Slide14.

[34] OECD, Basic Elements of a Law on Concession Agreements, p. 21.

[35] UNICTRAL, Legislative Guide, p.49.

[36] HM Treasury, Standardisation of PFI Contracts, Version 4, March 2007, pp.46-52.

[37] UNCITRAL, Legislative Guide, p. 201.

[38] UNECE, A Guide to Promoting Good Governance in Public Private Partnerships, 2007, p. 8.

[39] OECD, Basic Elements of a Law on Concession Agreements, p. 11 and p. 23.

[40] UNCTAD, World Investment Report, Transnational corporations, Extractive Industries and Development, p. 108 and pp. 159-160.

[41] UNCITRAL, Legislative Guide, pp. 152.

[42] Given the situation of concession re-competition upon expiry and absence of the possibility of renewal, the Law and Regulations cannot be silent on the matter of compensation to be paid by a new concessionaire to an exiting concessionaire to reimburse the latter for any unamortized residual value remaining in its investments under the expiring concession. Such compensation arrangements are often set in PPP legislation as part of the process of transferring assets to a new concessionaire. See UNCITRAL, Legislative Guide, p. 162.

[43] Ibid, p. xxiii.

[44] See Kosovo’s Law on Public-Private Partnerships and Concessions, Art. 56-57; and Mongolia’s Law on Concessions, Art. 23.

[45] UNCITRAL, Model Legislative Provisions, pp. 12-13.

[46] UNCITRAL, Legislative Guide, pp. 139-140.

[47] Dr. Jürgen Voss, United Nations Mission in Kosovo/European Union quoted in OECD, Basic Elements of a Law on Concession Agreements, p. 9

Table 1. Mozambique's Proposed Law on PPP and Megaprojects: Summary of Possible Best-Practice Issues

Law / Regulation (Articles)	Nature of Law and Regulations Provision	Suggested Best Practice	Comment on Law and Regulations vs. Best Practice
A. Under-Specified Provisions			
Law: Art. 1, 18, Glossary Regulations: Art. 26-29, 54	Definition of PPP forms and contracting modalities. Three forms (only) specified: • Concession contract (Contrato de concessão) • Operating concession contract (Contrato de cessão de exploração) • Management contract (contrato de gestão)	Detailed listing and specification of a variety of PPP forms, covering projects: • Developing/using new facilities ("Greenfield PPP"): DBFO, BOT, BLT, etc. • Rehabilitating/using existing facilities: ROT, RLT, BROT, etc. • Where concessionaires own new/existing facilities: BOOT, BOO • Where concessionaires operate/maintain facilities : mgmt contracts, affermage	1. Law's definitions of PPP forms are too general and do not convey breadth and flexibility of PPP solutions desired to encourage creativity and flexibility to meet wide range of different circumstances for project risk allocation. 2. Law may eliminate certain common and useful PPP forms (BOOT, BOO) in which PPP company needs to have rights in ownership, either temporarily or indefinitely. (See below: "Rights in ownership for concessions".)
Law: Art. 8, 17, 48 Regulations: Art. 12, 16-22, 61-66	Tendering. Compulsory public tender is required for all projects including unsolicited ones. Phases of procedure for identifying and analyzing project opportunities and for evaluating proposals set forth.	Comprehensive description of all phases of tendering process steps: • Pre-selection • Request for proposals • Negotiation without competitive bidding • Unsolicited proposals • Award and review	1. Law seems less comprehensive in scope than UNCITRAL Model Legislative Provisions. 2. Model Provisions seems more concise and organized with less overlap and a more streamlined sequence. 3. Gaps in Law's tendering process: pre-selection, robustness of evaluation criteria, negotiation absent competitive bidding, review procedures for unsuccessful bidder.
Law: Art. 10 Regulations: Art. 14	Rights in ownership for concession. State (or public sector contracting entity) may retain all ownership rights in the PPP concession. But step-in rights envisaged in Regulations.	Inclusion of key provisions to facilitate debt financing in concessions, notably: • Concessionaires create rights in ownership in concession assets • Step-in rights for concession financiers	1. Ambiguity in concession ownership rights may limit a concessionaire's ability to pledge and mortgage assets, including future income streams, thus constraining concession finance. 2. Lack of ownership rights for concessionaire could make some PPP formulas (BOOT, BOO) unworkable. 3. Clear and prominent statement of rights of concession financier (step-in rights) would strengthen Law.

Law / Regulation (Articles)	Nature of Law and Regulations Provision	Suggested Best Practice	Comment on Law and Regulations vs. Best Practice
Law: Art. 11-14 Regulations: Art. 6-9	Institutional framework for oversight. Four parties are designated to monitor and supervise PPP project company: • Sectoral oversight ("tutela sectorial") • Financial oversight ("tutela financeira") • PPP Unit • Regulatory authorities	Structures and procedures designed to provide strong, clear and consistent administrative coordination for efficiency and transparency in: • Permitting and licensing • Supervision by regulators and other monitoring entities • Review of regulator/other entity decisions	1. Law's complex and duplicative oversight structure has potential for creating great inefficiency and conflict. 2. Strong centralized coordinating entity is lacking and PPP Unit may be too subordinate and weak to play desired administrative coordination role. 3. Unclear/overlapping regulator-oversight responsibilities – and some omissions (e.g., review of regulatory decisions).
Law: Art. 42, 48, 51-52 Regulations: Art. 55, 72	Termination. Circumstances under which a contract can be terminated or cancelled are left to the Council of Ministers to define, although violation of Law provisions can lead to termination by oversight entity in whose area violation occurs.	Explicit statement of rights and conditions of termination by: • Contracting authority • Concessionaire • Either party (by mutual consent) Explicit statement of principles underlying compensation at termination (or expiry)	1. Lack of specific overall termination framework governing termination, including recognition of concessionaire rights, introduces uncertainties that weaken Law. 2. Provision for termination by oversight entity for concessionaire violation of Law (with no mention of right of recourse) risks arbitrary action and conflict. 3. Absence of mention in Law of possible compensation at termination creates risks and uncertainties.
Law: Art. 54 Regulations: Art. 74	Agreements already signed ("stabilization clause"). Renegotiation of already signed PPP agreements to be consistent with Law "is permitted" and all new project agreements are to be consistent with Law's sharing of benefits and prevention of risks.	Clear stabilization clause: e.g., contracts signed prior to the Law are not subject to the Law, but can only be renewed, amended or extended in compliance with the Law.	1. Law introduces uncertainties that undermine stability of PPP framework, with potential adverse impacts on Mozambique's investment climate and general attractiveness for FDI.
B. Over-Specified Provisions			
Law: Art. 9 Regulations: Art. 13	Duration of Contracts. Maximum lengths (concession contracts, 25 years; operating concession contracts, 20 years; management contracts, 15 years) with detailed subsidiary ceilings, all based on economic amortization of investments.	Maximum contract durations, but sufficient flexibility for contracting authority and concessionaire to negotiate a contract term in each case that is appropriate to the project in question.	1. Maximum contract durations may be adequate (for infrastructure), but subsidiary ceilings seem overly rigid and arbitrary and may hamper negotiation of effective PPP project risk allocations. 2. Contract maximums and subsidiary ceilings may not fit mining, oil/gas and other natural resources.

Law / Regulation (Articles)	Nature of Law and Regulations Provision	Suggested Best Practice	Comment on Law and Regulations vs. Best Practice
Law: Art. 20 Regulations: Art. 31	National ownership. Minimum 20% ownership in all PPP projects may (Law) / must (Regulations) be reserved for individual local investors, with Government facilitating ownership share distribution within 5 years of first profitable project year results. Foreign- financed PPP projects should consider opening ownership to local firms.	No specific PPP best practice regarding national participation in ownership in PPP projects.	1. Contradiction between Law and Regulation the framing the national ownership reservation must be resolved. 2. National ownership requirement is not normally an issue for PPP legislation (South Africa's BEE policies are a notable exception). 3. Minimum 20% national participation share is restrictive (South Africa's flexible BEE approach is more pragmatic). 4. National ownership requirements (restriction on foreign equity) are not generally a best-practice issue. 5. If national ownership rules are imposed, Government may well need to be major equity participant, providing capital and fulfilling requirements, at least temporarily.
Law: Art. 21 Regulations: Art. 32	Concession award fee. Concession contracts/operating concession contracts are to pay award fees at contract signing between 5% and 10% of expected average annual after-tax profits, with exact payment rates set in relation to length of concession contract.	Concession award fees are not uncommon in PPP projects, but neither are they universal, and when applied, do not necessarily reflect any standard best-practice fee structures or payment formulas or levels.	1. Law/Regulations' across-the-board requirements and formulas for payment of contract award fees by PPP projects are overly restrictive and probably excessive (especially when combined with royalty fees). 2. Such award fees, when required, should reflect best-practice principles of flexibility in PPP arrangements, and would be established relative to specific circumstances of a given PPP project under negotiation.
Law: Art. 22-23 Regulations: Art. 33-34	Concession/management contract royalties. Concessions/operating concessions pay royalties of 5%-10% of average annual after-tax profits (fixed) plus 5%-10% of gross receipts net of indirect taxes (variable). Management contracts pay royalties of 5%-10% of gross receipts net of indirect taxes. Exact payment rates are scaled to contract duration.	Concession royalty payments are often included in PPP projects, although subsidies (reverse royalties) are also common; when applied, royalties do not necessarily reflect any standard best-practice payment structures, formulas or levels.	1. Law/Regulations' across-the-board requirements and formulas for payment of royalties by PPP projects are overly restrictive and probably excessive (especially when combined with concession award fees). 2. Such royalties, when required, should reflect best-practice principles of flexibility in PPP arrangements, and would be established relative to the specific circumstances of a given PPP project under negotiation.

Law / Regulation (Articles)	Nature of Law and Regulations Provision	Suggested Best Practice	Comment on Law and Regulations vs. Best Practice
Law: Art. 26 Regulations: Art. 38	Profits and dividends. Profits and dividends are to be distributed after the close of the fiscal year or other relevant PPP project accounting period.	No specific PPP best practice regarding distribution of profits and dividends and retaining earnings in PPP projects.	1. Law and Regulations are silent on the issue of retaining earnings in PPP projects, an option which is essential for good financial management. 2. If Law and Regulations impede PPP project companies from retaining earnings, this outcome is too restrictive and should be amended.
C. Other Provisions Requiring Clarification			
Law: Art. 3 Regulations: Art. 3	Scope. All undertakings included within: • Public-private partnerships providing goods and services in the public domain • Megaprojects (investment of $500 mn, involving concessions in minerals, oil/gas and other natural resources, covered by Investment law/fiscal incentives regime) • Other business concessions in the public domain	Many PPP and concession laws tend to be narrower in scope – e.g., for privately financed infrastructure or social services – but some model legislation exists that is designed to simultaneously cover PPP arrangements in infrastructure, social services and natural resource activities.	1. Scope of Law and Regulations may be too broad and ambitious in Mozambique conditions, given vast differences in scale and nature of potential PPP activities in infrastructure, social services, and business operations in the public domain, versus Megaprojects. 2. Options might be to (a) analyze likely impacts of universal application of Law/Regulations across all sectors and Megaprojects in terms of PPP project economics and Mozambique's competitiveness for FDI, and (b) develop separate PPP legislation for Megaprojects.
Law: Art. 9, 43 Regulations: Art. 13, 56	Extension and renegotiation. Concessions are not renewed but are re-competed upon expiry, although extension of concessions up to one-half initial contract duration is possible in certain limited circumstances, and after 5 years renegotiation is possible upon mutual consent to meet changing conditions.	PPP best practice often excludes concession renewal, but envisages extension and renegotiation under certain limited and well defined conditions.	1. Law and Regulations are broadly consistent with typical PPP legislation on issue of renewal, extension and renegotiation of concessions. 2. In the absence of concession renewal option, upon concession expiry, provisions are needed to permit compensation for exiting concessionaires for possible unamortized residual value of investments to be transferred to new incoming concessionaires.
Law: Art. 44 Regulations: Art. 55, 57	Performance guarantees. Performance guarantees are required for bidding and implementing concessions.	PPP best practice typically includes performance bonding, both in bidding and implementation stages.	1. Law and Regulations seem broadly consistent with typical PPP legislation on performance bonding issues. 2. Details of bonding requirements are typically left to bidding documents and project agreements to specify.

Law / Regulation (Articles)	Nature of Law and Regulations Provision	Suggested Best Practice	Comment on Law and Regulations vs. Best Practice
Law: Art. 24 Regulations: Art. 36	<u>Foreign exchange earnings</u>. PPP projects exporting or import substituting should have a positive impact on foreign exchange earnings and balance of payments.	No specific PPP best practice regarding foreign exchange and balance of payments effects in PPP projects.	1. Statement is more appropriate for policy declaration on PPP objectives, as no right or obligation is created under the Law/Regulations (except for regulatory authority and oversight entities to measure foreign exchange impacts). 2. Provision should be excluded if it might be interpreted as a predicate for eventually restricting PPP project access and use of foreign exchange, thus creating uncertainties.

ANNEX 1. Outline of the Structure and Articles of Republic of Kosovo's Law No. 03/L-90
On Public-Private Partnerships and Concessions in Infrastructure and the Procedures for Their Award

Article	Title
PART I	**GENERAL PROVISIONS**
1	Purpose
2	Scope of application
3	General principles
4	Definitions
PART II	**PPP AND CONCESSIONS**
5	Authorization to grant rights for Public-Private Partnerships and Concessions
6	Contracting authority
7	Forms of partnership
8	Duration
9	Ownership of assets
10	Financial rights
PART III	**INSTITUTIONAL COORDINATION AND RESPONSABILITIES**
11	PPP Inter-ministerial Steering Committee (PPP-ISC)
12	Competencies of the PPP-ISC
13	PPP unit
14	Rights and responsibilities of the Contracting Authority
15	Rights and responsibilities of the Private Partner
16	Rights and responsibilities of Users of an Infrastructure Facility
17	PPP appropriations
PART IV	**IDENTIFICATION OF POTENTIAL PROJECTS AND AWARD PROCEDURES FOR THE AWARD OF CONCESSIONS AND PUBLIC-PRIVATE PARTNERSHIPS**
	Part I IDENTIFICATION
18	Public sector initiative
19	Private sector initiative
	Part II SELECTION
	Ch 1 General principles
20	Rules governing the selection and award proceedings
21	Nullity of agreements
22	Selection stages
	Ch 2 Prequalification and pre-selection of bidders
23	Purpose and procedure of prequalification
24	Pre-selection criteria
25	Participation of consortia
26	Decision on pre-selection
	Ch 3 Procedure of requesting proposals
27	Single-stage and two-stage procedure for solicited proposals
28	Content of Request for proposals
29	Bid securities
30	Clarifications and modifications
31	Submission of proposals
32	Evaluation criteria
33	Comparison and evaluation of proposals
34	Further demonstration of fulfillment of qualification criteria
35	Final negotiations
	Ch 4 Negotiation of agreements without competitive procedures
36	Circumstances authorizing award without competitive procedures
37	Procedures for negotiating agreements
	Ch 5 Unsolicited proposals
38	Admissibility of Unsolicited Proposals
39	Procedures for determining the admissibility of Unsolicited Proposals
40	Initiation of selection procedures
	Ch 6. Miscellaneous Provisions
41	Confidentiality
42	Notice of contract award

43 Record of selection and award proceedings
44 Review procedures

PART V **THE PPP AGREEMENT**

Part I CONTENT AND GENERAL PROVISIONS

45 Governing law
46 Content of agreement
47 Ownership of assets
48 Acquisition of rights related to the project site
49 Easements
50 Operation of infrastructure
51 Financial provisions
52 Organization of the private partner
53 Transfer of controlling interest in private partner
54 Security interests
55 Assignment of the Agreement
56 Change of Law
57 Revision of the agreement
58 Step-in by Contracting Authority
59 Substitution of the Private Partner

Part II DURATION, EXTENSION, EXPIRY AND TERMINATION

Ch 1 Duration and extension

60 Duration and extension

Ch 2 Expiry and Termination

61 Expiry
62 Early termination of the Agreement by the contracting authority
63 Early termination of the Agreement by the private partner
64 Early termination for other reasons

Ch 3 Arrangements upon Expiry and Termination

65 Compensation under termination of the Agreement
66 Wind-up and transfer

Ch 4 Dispute Resolution

67 Disputes between the Contracting Authority and the Private Partner
68 Binding arbitration
69 Disputes involving customers or users of the infrastructure facility

PART VI **PROCEDURES OF PROCUREMENT REVIEW**

70 Procurement review body

PART VII **FINAL PROVISIONS**

71 Law in force
72 Transitory period
73 Implementation of law
74 Entry into force